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Supreme Court Of The United States

OCTOBER TERM – 1971

NO. 69-5003

WILLIAM HENRY FURMAN

Petitioner,

VS.

STATE OF GEORGIA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT

OF GEORGIA

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STATEMENT OF FACTS

William Henry Furman was tried and convicted on the 20th day of September, 1968, for the murder of William Joseph Micke, Jr., and sentenced to death by electrocution as a result of the verdict of the Jury.

Mrs. Lanell Micke after being sworn testified that between the hours of 2:00 and 2:30 A.M., on August 11, 1967, she and her husband thought they heard one of their five children, Jimmy, walking in the kitchen. The son Jimmy, was a chronic sleep walker. (Tr. of E. page 17, lines 19 through 33). She and her husband lay in bed about five minutes and heard the noise again coming from the kitchen and her husband removed himself from the bed to investigate. (Tr. of E. page 18 lines 25 through 40). She heard her husband call out to Jimmy to get back in bed, heard his footsteps quicken and all of a sudden heard a loud sound and he screamed. (Tr. of E. page 17 lines 1 through 14). She became frightened got all her children in one room and started screaming for Mr. Dozier: the next door neighbor. (Tr. of E. page 17, lines 16 through 20). Mr. Dozier and a person named Johnnie came over shortly after the screaming of Mrs. Micke and called the Police. (Tr. of E. page 19 lines 25 through 29). She testified that there was a back porch to the house where she and her husband lived and that you could gain entry into the kitchen from this back porch. The porch was enclosed by a screen and the screen door has a lock which she did not remember whether the screen door was locked that night. (Tr. of E. page 19 lines 38 through 41, page 20 lines 1 through 15). Mrs. Micke did not go to the kitchen because she was scared and feared for the lives of her children. (Tr. of E. page 21 lines 39 through 41, page 22 lines 1 through 6).

Sgt. G.W. Spivey of the Savannah Police Department testified that he answered a call to 508 West 63rd Street, the home of the deceased, at approximately 2:30 A.M., on August 11, 1967. (Tr. of E. page 24 lines 15 through 20). When he arrived he went in the back door and acting on information he received and believing the subject was still in the house crouched in the doorway leading to the kitchen at which time he saw the

body which later was identified as Mr. Micke. (Tr. of E. page 25 lines 1 through 29). Upon his examination he did not find anyone else in the house other than Mrs. Micke and her children. (Tr. of E. page 25 lines 21 through 29).

Dr. Harold Smith, Coroner for Chatham County, Georgia, testified that on the 11th day of August, 1967, he examined the body of William Joseph Micke, Jr., and that death was caused by a bullet wound which entered the upper chest causing severe lung hemorrhage. (Tr. of E. page 32, lines 23 through 28). He removed the bullet from the body of Mr. Micke and turned this bullet over to Detective B.W. Smith. (Tr. of E. page 32, lines 29 through 34).

Sgt. J.E. Mincey of the Savannah Police Department Identification Officer, testified that on August 11, 1967, he went to the address of 508 West 63rd Street and lifted from the back porch on a washing machine some latent fingerprints that he compared these prints with the known prints of William Henry Furman and that they were identical. (Tr. of E. page 33 lines 20 through 35, page 34, lines 1 through 14). These prints, both latent and known prints were sent to the Federal Bureau of Investigation in Washington, D.C.. (Tr. of E. page 34, lines 16 through 19).

John F. Walters, Federal Bureau of Investigation Identification Division, testified that he examined and compared the prints sent by Officer Mincey and that the known prints of Furman are identical with the latent prints. (Tr. of E. page 35 lines 21 through 29, page 36 lines 1 through 20).

Officer Alphonso Hall, Savannah Police Department, testified that he answered the call to 508 West 63rd Street at approximately 2:30 A.M., on August 11, 1967. (Tr. of E. page 37 lines 28 through 30). Officer Hall left the residence to search the general area for the suspect. (Tr. of E. page 37, lines 35 through 37). He stationed himself southwest of 508 West 63rd Street and observed a subject coming out of the wooded area from the direction where Mr. Micke was killed. (Tr. of E. page 38, lines 1 through 24). After radioing for help he followed this subject to 5020 Temple Street where he found the subject under the house. (Tr. of E. page 39,

lines 9 through 40, page 40 lines 1 through 18). After the subject, who Officer Hall identified as Petitioner was removed from under the house he was searched by Officer Goode and a 22 pistol removed from his person. (Tr. of E. page 40 lines 25 through 33).

Officer J.R. Goode, Savannah Police Department, testified that on August 11, 1967, that he made a search of the Defendant and removed a 22 pistol which he identified as the pistol in Court. (Tr. of E. page 40 lines 24 through 35, page 42 lines 1 through 10).

Detective B. W. Smith, Savannah Police Department, testified that the petitioner made a statement to him whereby he admitted being in the man's kitchen, the man saw him grabbed for him, he went out the door, slammed the door, turned around and fired one shot and ran. (Tr. of E. page 47 lines 36 through 41).

Dr. Charles Sullenger, Senior Toxicologist, State Crime Laboratory, Chatham County, Georgia, testified that he was given the bullet removed from the victim's body and the pistol taken from petitioner, made the ballistics test and found that the bullet taken from the victim's body was fired from the pistol taken from petitioner. (Tr. of E. page 50 lines 8 through 18).

Petitioner took the stand and in an unsworn statement admitted going in the house of the victim but stated that he fell back and the gun discharged accidentally. (Tr. of E. page 54, lines 33 through 40, page 55 lines 1 through 2).

ARGUMENT AND LAW

Respondent contends that the death penalty should be kept in force and effect and in support of this position directs this Honorable Court to an old case decided by the United States Supreme Court in the matter of William Kemmler, 34 Lawyers Edition, page 519, 136, U.S., 436, 447, wherein the Court held:

> "The provisions in reference to cruel and unusual punishment taken from the well-known Act of Parliament of 1688, entitled rehearsing the various grounds of grievances and among others, that 'excessive bail hath been required of persons committed in criminal cases, to elude

the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishment inflicted;' it is declared that 'excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Court after declaring this Act of Parliament went on further to state that the language used in the Constitution of the State of New York, from which this case came, was intended particularly to operate upon the legislature of the State, and while the language of the Constitution of the State of New York was similar to the declaration of rights referred to, that the Courts of the State of New York had the right to declare punishment cruel and unusual. This to include burning at the stake, crucifixion, breaking on the wheel or the like.

The Court in, In Re: Kemmler, Supra, further stated:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarious, something more than mere extinguishment of life."

The United States Supreme Court in the case of Wallace Wilkerson vs. People of the United States in the Territory of Utah, 25 Lawyers Edition, page 345, 99 U.S., page 130, in reference to the death penalty, stated:

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted; but it is safe to affirm that punishments of torture such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution."

In the Wilkerson case the Court was concerned with the mode of punishment declared by the trial Court. The Defendant was on the 14th day of December next between the hours of 10:00 in the forenoon and 3:00 in

the afternoon to be taken to a place certain and there publicly shot until dead. The Court in its opinion stated:

> "Cruel and unusual punishment is forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the Eighth Amendment."

It can be seen that the question of cruel and unusual punishment dates back as far as the eighteen hundreds and the Supreme Court of these United States even then recognized that there was difference in the mode of executing the death penalty and even then they drew a distinction between the humane death and inhumane death such as torture or lingering death.

In the case of Trop vs. Dulles, 356 U.S. page 86, 2 Lawyers Edition 2, page 630, 78 Supreme Court 590, the Court in an opinion delivered by Chief Justice Warren joined in by Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Whitaker stated the following:

> "At the outset, let us put to one side the death penalty as an index of the Constitutional limit on punishment. Whatever the argument may be against capital punishment, both on moral grounds and the terms of accomplishing the purpose of punishment; and they are forceful, the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it can not be said to violate the Constitutional concept of cruelty. But it is equally plain that the existence of all death penalties is not a license to the Government to devise any punishment short of death within the limit of its imagination."
>
> "The exact scope of the constitution phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights

of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

The Trop case was decided March 31, 1958, almost one hundred years after the Wilkerson case was decided. The concept of the United States Supreme Court with regard to the death penalty, in the late eighteen hundreds and the middle nineteen hundreds has not varied or changed. The concept of the death penalty as being cruel and unusual punishment is only limited by the execution of that death penalty. The Courts through the years have consistently held that if the mode of executing the death penalty is not that of our ancestors from England, such as breaking on the wheel, torture, or a slow and lingering death then it does not come within the Eighth Amendment of the Constitution of the United States. If the mode of execution is a dignified means then this type of execution has been accepted by our Courts as being within the frame work of our Constitution and should continue to be within that frame work.

Throughout the years the Supreme Court has not seen fit to remove from States the power or powers to deal with criminals in the way they saw best provided that it did follow civilized standards."

The consent of not interferring with the States' powers was exemplified in a decision handed down by Mr. Justice Black, June 3, 1949, in the case of Samuel Titto Williams vs. The People of the State of New York, 93 Lawyers Edition page 1337, 337 U.S., page 240 through 253. This is a case where the petitioner was charged with murder and in a two-week trial was found guilty and recommendation of life imprisonment was forth-coming from the Jury. Under New York state law the Judge had the power and the right to either accept the recommendation of the Jury or to impose a sentence he felt justified. In this particular case after the verdict of the Jury, the trial Judge heard additional evidence as to the past activities of the petitioner and sentenced him to

death. In giving his reasons for imposing the death sentence the Judge discussed in open Court the evidence upon which the Jury had convicted stating:

> "That this evidence had been considered in the light of information obtained through the Court's probation department and through other sources."
>
> The case was appealed to the United States Supreme Court for violation of due process in that petitioner was not allowed to examine the extra-ordinary evidence or to cross-examine the witnesses who gave this evidence.
>
> Mr. Justice Black in delivering the opinion of this Court stated the following:
>
> "To deprive sentencing Judges of this kind of information would undermind modern penological procedural policies that has been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by Judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."

Mr. Justice Black went on to say:

> "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts, state and federal, from making progressive efforts to improve the administration of criminal justice."

It can be seen by Mr. Justice Black's opinion in the Williams case that states must have a right and the power, within the confines of the Constitution of the United States of America, to deal with criminal justice as their Legislatures deem best.

In the case of Laurence Aikin Jackson vs. Fred R. Dixon, 325 Federal 2d page 573, the Appellant in his petition and on argument in the Ninth Circuit Court of Appeals contended that the carrying out of the death

penalty would deprive him of due process and also that it would amount to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. In delivering the opinion, Circuit Judge Duniway stated:

> "Traditionally the death penalty has been deemed an appropriate punishment for murder."
>
> Circuit Judge Deniway went on to say:
>
> "Here there is no suggestion as there was in certain of the cases above cited, that the method of administering of penalty is cruel and unusual. The contention is only that the penalty itself is of that character. This contention, in light of the foregoing authorities we must reject."

"Jackson's arguments, which attack the penalty as incompatible with modern concepts of justice, would more properly be addressed to the California Legislature. It is not for us to write our personal views on the matter, whatever they may be, into the Constitution. We hold that if the State is free to find Jackson guilty of murder in the first degree, as Leland makes clear that it was in this case, it does not violate the Eighth Amendment, made applicable to it by the Fourteenth Amendment, by imposing the death penalty upon him."

I think Judge Duniway has made clear the position which we believe should be taken by this Honorable Court, that position being that regardless of our personal feelings toward the death penalty and regardless of whether we feel that a person deserves or does not deserve ultimate punishment that we must confine ourselves to the question of whether or not the death penalty is, or is not, prohibited by the Eighth Amendment of the Constitution of the United States of America. We think it goes without saying that any type of torture or lingering death that is calculated to put a person in misery before he dies, is the type of death penalty outlawed and prohibited by the Eighth Amendment of the Constitution. Any type of death penalty, such as death by electrocution, by being shot, or by being put to death by gas, is the type of execution that is known to civilized men and is a type of execution that is constitutionally protected by the Eighth

Amendment and has been constitutionally protected by the United States Supreme Court in former years.

We find it difficult in 1971 to say that death by electrocution is wrong now but was right in the year 1958 and was right in 1879. The offense of murder, as the offense of rape, was wrong in 1879, it was wrong in 1958, and is wrong in 1971. The punishment for those crimes has been the same for almost one hundred years and we can not see now where the punishment should be deemed cruel and unusual.

Petitioner contends that the death penalty is cruel and unusual punishment and therefore should be eliminated because it violates the Eighth Amendment of the Constitution of the United States of America.

Respondent respectfully directs the Court's attention to a case decided by this Honorable Court on the 13th day of January, 1947, which was a case of State of Louisiana ex rel. Willie Francis, Petitioner, vs. E. Al Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al., 329 U.S. 459 through 481, 91 Lawyers Edition page 422, wherein petitioner Francis was convicted of the offense of murder and sentenced to die in the electric chair on the 3rd day of May, 1946, pursuant to a death warrant. On the 3rd day of May, 1946, Petitioner was prepared for execution and sat in the electric chair and the Executioner threw the switch but, presumably, because of some mechanical malfunction, the current did not come on and dealth did not result. Therefore petitioner was removed from the electric chair and a new death warrant issued by the Governor of Louisiana fixing the date of execution for May 9, 1946.

After a refusal of an application to the Supreme Court of the State of Louisiana, petitioner brought his case before the United States Supreme Court alleging a denial of due process and also alleging cruel and unusual punishment. The denial of due process consisted of the violation of the Fifth Amendment which was double jeopardy and the cruel and unusual punishment consisted of the violation of the Eighth Amendment, cruel and unusual punishment, all as applied to the State of Louisiana through the Fourteenth Amendment.

In announcing the decision, which was joined in by the Chief Justice, Mr. Justice Black and Mr. Justice Jackson, Mr. Justice Reed stated the following:

> "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense ... But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. ... Even where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment ...
>
> As this is a prosecution under State law, so far as double jeopardy is concerned, the Palco case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the State that results in a death sentence instead of imprisonment for life and the execution that follows because of failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the State's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution."
>
> "We find nothing in what took place here which amounts to cruel and unusual punishment in the Constitutional sense. The case before us does not call for an examination into any punishment except that of death..." The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth Amendment would prohibit by its due process clause execution by a state in a cruel manner.
>
> "Petitioner's suggestion is that because he once underwent the pyschological strain of preparation for electrocution, now to require him to undergo this

preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subseqtient execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty."

We can see by the Francis case (Supra) that the Supreme Court of the United States still upheld the theory that unless the type of execution to effect the death penalty is that of torture or lingering death then, even though the malfunction of the device used occurred to effect that type of punishment failed, it still is not excluded by the Eighth Amendment of the Constitution. Surely this Honorable Court would agree that the Francis case (Supra) would come close, if not the closest, to meeting a definition of a lingering death. Can this Court say that to prepare a person for death, see him upon the instrument that would cause his death, and let him experience all the fears of death including meeting the Supreme Being that created him, whether he stands in his favor or not, and death not resulting and then have this person returned at a later date to this instrument for the purpose of accomplishing the end that theretofore had failed, would not come within a lingering death? This was answered by the highest Court of our land in the year 1946, in the negative. Can this Honorable Court, as presently constituted, sixteen years later, say that death

by electrocution in a penal institution, in the sovereign state of Georgia, now constitutes cruel and unusual punishment and is a type of punishment prohibited by the same Eighth Amendment of the United States Constitution that existed in 1946?

As the Court can well see we have a young couple with five children in the safety of their home at 2:30 A.M., on August 11, 1967. The victim, Mr. Micke believing his child is sleep walking, leaves his bed, and his wife and goes into the kitchen to find not his child but an intruder. In an effort to protect his wife and five children he attempted to stop this intruder whereupon Petitioner runs out, slamming the door and fires at Mr. Micke. Petitioner says the penalty of death for this murder is too cruel and too unusual and therefore should be prohibited by the Eighth Amendment of the Constitution of the United States of America. I wonder what Mrs. Micke, who is now left alone to rear five children, thinks of what he did to her husband at 2:30 A.M., on August 11, 1967? I wonder if Petitioner's battery of Attorneys would say that William Henry Furman committed an act of cruel and unusual punishment on William Joseph Micke, Jr.? I wonder if they would say that William Henry Furman committed an act of cruel and unusual punishment on Mrs. Micke and her five young children? I am sure they think this is a deliberate crime and they grieve for the widow and fatherless children but now say that it is not right to take the life of a burglar, murder, who left the widow and five fatherless children. We don't accept the view taken by Petitioner or his Attorneys. We think the crime that he has committed is senseless, hideous and one for which he should be given the ultimate punishment which is death by electrocution.

We have a person before this Court, who broke into the house where a mother and father and five children lived. After being discovered by the head of the household he ran, but when he was outside on that porch after having slammed the door between Mr. Micke and himself, he wasn't content with just running away, he turned around and in a wanton, wilful disregard for human life he fired that 22 pistol through the door and into Mr. Micke's chest causing the death of Mr. Micke.

Can this Court now say that the crime committed was not a crime that deserved the death penalty? Throughout our legal history and throughout Biblical history man has invoked the death penalty, the Church has invoked the death penalty. The death penalty in our United States has been upheld as cited to this Court on numerous occasions. It has been guaranteed the protection by the Eighth Amendment for numerous years. Provided that it is not a torturious death or a lingering death. Our Bible says: "An eye for an eye and a tooth for a tooth, a life for a life."

Our Bible says: "Render unto God the things that are God's and to Ceasar the things that are Ceasar's." We take the position that the State of Georgia has seen fit to invoke the death penalty; that our Legislature has seen fit to allow this Statute to remain on the books of the State of Georgia and now we are only rendering to Ceasar the things that are Ceasar's.

Petitioner in this case, as the petitioner in the case of Lucious Jackson, has made the same over-tones of racial discrimination. Let it be well understood by this Court that this State stands not for discrimination because of race, color or creed, but it stands for justice. Should it be a person of color that killed Mr. Micke or should it have been a white man and had he received the death penalty as petitioner did, this writer and this State would be as strong in favor of that execution being carried out as they are in this execution being carried out. This writer has never experienced an intruder in this house in the middle of the night and hopes he never will. I think there is nothing more terrifying than to be awakened in the middle of the night and find an outsider in my house.

We contend that when Petitioner broke into the victim's house he was armed with a pistol; we believe that he carried that pistol for the express purpose that if he was detected he would use that pistol to accomplish his end, whether it meant the extinguishment of life or not. We think the crime that he has committed deserved the death penalty; deserved the State taking his life, as he took the life of William Joseph Micke, Jr.

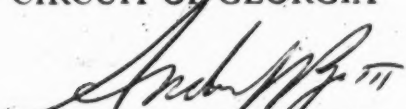
We ask only that this Honorable Court decide this case on the same legal basis that past Supreme Courts have decided this question.

Death by electrocution is not that type of torture or lingering death that is prohibited by the Eighth Amendment of our Constitution. It is not that type of death which shocks the senses of civilized men. It is that type of punishment that has been sanctioned by this Court for almost one hundred years. It is that type of punishment that has been sanctioned by the English Parliament for hundreds of years.

We respectfully request that this Court affirm the decision of Georgia Supreme Court and uphold the death penalty as a proper means for punishment.

Respectfully submitted,

DISTRICT ATTORNEY, EASTERN JUDICIAL CIRCUIT OF GEORGIA



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